LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 14 1955
HAROLD B. WILLEY, Clerk

No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1955

REX TRAILER COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
The statutory background	4
The proceedings in the instant case	7
Summary of argument	10
Argument:	
The Government's suit to recover under Section 26(b)(1) of the Surplus Property Act is not barred by the prohibition against double jeopardy	12
A. Well-established principles support the holding below that recovery by the Government would not place petitioner in jeopardy for a second time	13
B. The fact that no damages were alleged does not convert the suit into an action for a penalty	27
Conclusion	39

CITATIONS

Cases:

Atchison, Topeka & Santa Fe Ry. v. *Nichols*, 264 U.S. 348	38
Barnes Coal Corp. v. *Retail Coal Merchants Ass'n*, 128 F. 2d 645	22
Bigelow v. *RKO Radio Pictures*, 327 U.S. 251	38
Boyd v. *United States*, 116 U.S. 616	14
Brady v. *Daly*, 175 U.S. 148	21, 38
Calvin v. *Huntley*, 178 Mass. 29	38
Chattanooga Foundry v. *Atlanta*, 203 U.S. 390	21-22
Clydebank Engineering & Shipbuilding Co. v. *Castaneda* [1905] A.C. 6	30
Coffey v. *United States*, 116 U.S. 436	13, 26
Cox v. *Lykes Brothers*, 237 N.Y. 376, 143 N.E. 226	22, 38

Cases—Continued

	Page
Crary v. *Porter*, 157 F. 2d 410	22
Currie v. *Flack*, 190 F. 2d 549	22, 38
Douglas v. *Cunningham*, 294 U.S. 207	38
Federal Trade Commission v. *Raymond Co.*, 263 U.S. 565	34
Fields v. *Washington*, 173 F. 2d 701	22
Gordon v. *Street* [1899] 2 Q.B. 641	34
Green v. *Victor Talking Machine Co.*, 24 F. 2d 378, certiorari denied, 278 U.S. 602	34
Guessefeldt v. *McGrath*, 342 U.S. 308	26
Hedden v. *Griffin*, 136 Mass. 229	34
Helvering v. *Mitchell*, 303 U.S. 391, 10, 14, 16, 19-21, 26, 27, 28, 36, 38, 39	
Huntington v. *Attrill*, 146 U.S. 657	21, 22
James-Dickinson Co. v. *Harry*, 273 U.S. 119	22
Meeker & Co. v. *Lehigh Valley R. Co.*, 236 U.S. 412	22
Murphy v. *United States*, 272 U.S. 630	14, 26
Murray & Sorenson, Inc. v. *United States*, 207 F. 2d 119	31
Overnight Motor Co. v. *Missel*, 316 U.S. 572	38
Priebe & Sons v. *United States*, 332 U.S. 407	29
Popham v. *Eyre*, Lofft 786, 98 Eng. Rep. 919 (Ch., 1774)	34
Robertson v. *Argus Hosiery Mills*, 121 F. 2d 285, certiorari denied, 314 U.S. 681	22
Schinkal v. *United States*, C.A. 9, No. 14313 (decided September 20, 1955)	22
Smith v. *Wheatcroft*, 9 Ch. Div. 223	34
Stockwell v. *United States*, 13 Wall. 531	36, 38
Sullivan v. *Associated Billposters and Distributors*, 6 F. 2d 1000	22
Sun Printing & Pub. Assn. v. *Moore*, 183 U.S. 642	30
United States v. *Bethlehem Steel Co.*, 205 U.S. 105	30
United States v. *Chouteau*, 102 U.S. 603	13
United States v. *Congress of Industrial Organizations*, 335 U.S. 106	26
United States v. *Grainger*, 346 U.S. 235	39
United States v. *Gramet*, 191 F. 2d 741	26

Cases—Continued

	Page
United States v. *Grannis*, 172 F. 2d 507, certiorari denied, 337 U.S. 918	18, 22, 31
United States v. *LaFranca*, 282 U.S. 568	13, 26
United States v. *One Dodge Sedan*, 113 F. 2d 552	26
United States v. *Real Estate Boards*, 339 U.S. 485	14, 20
United States v. *Rohleder*, 157 F. 2d 126	29, 30
United States v. *Smith*, 342 U.S. 225	39
United States v. *Walkof*, 144 F. 2d 75	30
United States v. *Weaver*, 207 F. 2d 796	10, 21, 32, 39
United States v. *Witherspoon*, 211 F. 2d 858	21, 39
United States ex rel. Marcus v. *Hess*, 41 F. Supp. 197	30
United States ex rel. Marcus v. *Hess*, 317 U.S. 537	10, 11, 12, 13, 14-19, 21, 22, 23, 26, 27, 28, 39
United States ex rel. Ostrager v. *Contractors*, 317 U.S. 562	14, 16
Various Items v. *United States*, 282 U.S. 577	14, 26
Wisconsin v. *Pelican Insurance Co.*, 127 U.S. 265	22
Woolworth Co. v. *Contemporary Arts*, 344 U.S. 228	37, 38

Constitution and Statutes:

Constitution of the United States:	
Fifth Amendment	13
Act of September 18, 1945, 59 Stat. 533, 50 U.S.C. App. (1946 ed.) 1614a, 1614b	5
False Claims Act (Rev. Stat. 5438, 3490, 31 U.S.C. 231)	14, 21, 22, 32
Federal Property and Administrative Services Act of 1949, 63 Stat. 377:	
Section 105, 5 U.S.C. 630c	5
Section 209, 40 U.S.C. 489	2
Section 502(a)	2
Revenue Act of 1928, Section 293	19
Surplus Property Act of 1944, 58 Stat. 765, *et seq.*, and as amended, 60 Stat. 168, 50 U.S.C. App. (1946 ed.) 1611 *et seq.*,	31
Section 2	4
Section 2(d)	4

Constitution and Statutes—Continued

	Page
Section 2(f)	4
Section 2(h)	5
Section 2(q)	5
Section 2(t)	5
Section 12 (1940 ed., Supp. V)	6
Section 13 (1940 ed., Supp. V)	6
Section 16 (1940 ed., Supp. V)	5
Section 26	2, 10
Section 26(b)	2, 3, 4, 10, 11, 12, 14, 21, 22, 23, 25, 39
Section 26(d)	11, 24, 25
18 U.S.C. 80	26
28 U.S.C. 1355	22
28 U.S.C. 2462	21, 39

Miscellaneous:

32 C.F.R. (1946 Supp.):	
Section 8302.8(d)	6
Section 8302.11	6
Section 8302.14	7
90 Cong. Rec. 7330	25
92 Cong. Rec. 4001	6
92 Cong. Rec. 4002	7
Executive Order No. 9689 of January 31, 1946 (11 F.R. 1265)	5
H. Rep. No. 1954, 79th Cong., 2d Sess., and p. 2	6, 7
H.R. 5125, 78th Cong., 2d Sess.	24
Quarterly Progress Report to the Congress by the War Assets Administration, Second Quarter of 1946, p. 19	7
Reorganization Plan No. 1 of 1947, Sec. 501, 61 Stat. 952	5
S. 2065, 78th Cong., 2d Sess.	24
S. Rep. No. 1057, 78th Cong., 2d Sess:	
pp. 2-3	31
pp. 13-14	4, 11, 24, 25
S. Rep. No. 1142, 79th Cong., 2d Sess.	6
pp. 1-2	35
p. 3	6

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 46

REX TRAILER COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the District Court granting the Government's motion for summary judgment (R. 12-13) is not reported. The opinion of the Court of Appeals (R. 17-23) is reported at 218 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1955 (R. 23). The petition for a writ of certiorari was filed on April 11, 1955 and granted on May 23, 1955 (R. 24). 349

U. S. 937. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the provision in Section 26(b)(1) of the Surplus Property Act for recovery by the Government of $2,000 plus double the amount of any damage for frauds perpetrated upon it is compensatory rather than penal so that suit thereunder does not subject petitioner to double jeopardy proscribed by the Fifth Amendment, although in a prior criminal proceeding based on the same frauds petitioner pleaded *nolo contendere* and paid the fines imposed.

STATUTE INVOLVED

Section 26 of the Surplus Property Act of 1944 (58 Stat. 765, 780, 50 U. S. C. App. (1946 ed.) 1635) provided in pertinent part: [1]

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

[1] Section 26 of the Surplus Property Act, having been replaced by the virtually identical Section 209 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 392, 40 U.S.C. 489), was repealed by Section 502(a) of the latter Act (63 Stat. 399).

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

* * * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

STATEMENT

This is an action brought by the United States pursuant to Section 26(b)(1) of the Surplus Property Act of 1944 (*supra*, pp. 2-3) to recover $2,000 for each of five frauds perpetrated by petitioner upon the United States in connection with the Government's disposal of surplus property. The District Court granted summary judgment for the Government and denied it to petitioner, thereby rejecting petitioner's claim that, since petitioner

had pleaded *nolo contendere* and paid fines in a criminal action based on the same events, this civil action for damages was barred by the Fifth Amendment's prohibition against double jeopardy (R. 12-13). The court below affirmed (R. 17-23). The pertinent facts may be summarized as follows:

The statutory background. Section 26(b) of the Surplus Property Act of 1944 (*supra*, pp. 2-3), pursuant to which this action was brought, grants to the United States civil remedies against "every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act * * *." Section 26(b) authorizes the United States to recover (1) $2,000 for each such fraudulent act plus twice the amount of any damages sustained plus the cost of suit; or (2) twice the consideration which the purchaser agreed to pay; or (3) the property, while keeping the full consideration paid by the fraudulent purchaser. See S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14.

The objectives of the Surplus Property Act of 1944 (58 Stat. 765) were to facilitate and regulate the orderly disposal of surplus property (Section 2, 58 Stat. 766, 50 U.S.C. App. (1946 ed.) 1611) while giving effect to twenty enumerated purposes, including (d) the discouragement of monopolistic practices and the preservation of small business,

(f) the giving of an opportunity to returning veterans to establish themselves in business, agriculture, or professional life, (h) the discouragement of disposal of surplus property to speculators, (q) the prevention of the making of unusual and excessive profits, and (t) the securing to the United States as nearly as possible the fair value of property disposed of under the Act, except when otherwise provided.

In order to carry out the statutory purpose of assisting veterans, Section 16 (58 Stat. 773, 50 U. S. C. App. (1940 ed., Supp. V) 1625), as originally enacted, authorized the Surplus Property Board[2] to prescribe regulations "to effectuate the objectives of this Act to aid veterans to establish and maintain their own small business, professional, or agricultural enterprises, by affording veterans suitable preferences * * *." The actual operation

[2] The Surplus Property Board was abolished and its functions were transferred to the Surplus Property Administration and the Surplus Property Administrator, respectively, by the Act of September 18, 1945, 59 Stat. 533, 50 U.S.C. App. (1946 ed.) 1614a, 1614b. Executive Order No. 9689 of January 31, 1946 (11 F.R. 1265), transferred these functions first to the War Assets Corporation and, effective March 25, 1946, to the War Assets Administration and the War Assets Administrator. Reorganization Plan No. 1 of 1947, Sec. 501, 61 Stat. 952, transferred these functions back to the Surplus Property Administration and the Surplus Property Administrator, changing their names, however, to the War Assets Administration and War Assets Administrator, respectively. The Federal Property and Administrative Services Act of 1949, Sec. 105 (63 Stat. 381; 5 U.S.C. 630c) finally placed these functions in the hands of the General Services Administration and the Administrator of General Services, respectively.

of the statute, however, disclosed that it was of little value to veterans since federal and state agencies enjoying higher priorities under Sections 12 and 13 (58 Stat. 770, 50 U. S. C. App. (1940 ed., Supp. V) 1621, 1622) absorbed virtually all the surplus property in which veterans were interested.[3] Congress, consequently, amended the Surplus Property Act in 1946 (60 Stat. 168) by giving veterans a priority surpassed only by that of the Federal Government and in addition authorizing the Administrator[4] to—

> * * * set aside or otherwise * * * [make] available quantities and types of any surplus property, except real property, which he determines to be appropriate for *exclusive disposal* to veterans for their own personal use, and to enable them to establish and maintain their *own* small business, professional, or agricultural enterprises. [Emphasis added.]

Property thus set aside for veterans enjoyed a superpriority surpassing even that of the United States.[5]

---

[3] Cf. S. Rep. No. 1142, 79th Cong., 2d Sess., and H. Rep. No. 1954, 79th Cong., 2d Sess.; 92 Cong. Rec. 4001.

[4] See fn. 2, p. 5, *supra*.

[5] S. Rep. No. 1142, 79th Cong., 2d Sess., p. 3, listed the priorities as follows:

1. Property set aside for veterans.
2. Federal Government.
3. Veterans generally.
4. Small business.
5. States and their political subdivisions and instrumentalities.

This preference was of great value to veterans, not only because it entitled them to acquire the property at an attractive price and on favorable credit terms,[6] but also because it enabled them to acquire those items which were in short supply. In 1946, the United States was still in the midst of reconversion, and surplus property sales were the only source from which many goods could be acquired.[7] As had been intended by Congress,[8] motor vehicles made up a large portion of the surplus property set aside for exclusive use for veterans.[9]

The proceedings in the instant case. The Government's complaint, which was filed on August 9, 1950 (R. 1-3), alleged in Count I that during the week of June 17, 1947, at Tinker Field, near Oklahoma City, Oklahoma, petitioner "did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration,

---

[6] 32 C.F.R. (1946 Supp.) 8302.8(d), 8302.11. The latter regulation provided:

> Disposal agencies shall fix the fair value at which property shall be acquired by priority claimants. *Such a fair value shall not be greater than the lowest price which is offered to any trade level at the time of acquisition* by the priority claimant, or where the fair value is fixed after examining competitive bids, it shall not be greater than the lowest acceptable bid. [Emphasis added.]

[7] See *e.g.*: H. Rep. No. 1954, 79th Cong., 2d Sess., p. 2; cf. Quarterly Progress Report to the Congress by the War Assets Administration, Second Quarter of 1946, p. 19.

[8] See H. Rep. No. 1954, 79th Cong., 2d Sess., p. 2; 92 Cong. Rec. 4002.

[9] Schedule of Property to be set aside for veterans: Exhibit A following 32 C.F.R. (1946 Supp.) 8302.14.

an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, serial 1940 USA 563821" (R. 2).[10] The complaint contained four additional counts, numbered II through V, which are identical with Count I except as to the name of the person whom petitioner had caused to make the false statement and the description of the vehicle involved (R. 2-3). On the basis of the allegations contained in these five counts, the complaint prayed for judgment in the amount of $2,000 for each of the five frauds perpetrated by petitioner upon the War Assets Administration, as provided in Section 26(b)(1) of the Surplus Property Act (*supra*, pp. 2-3), a total of $10,000 plus costs (R. 3).

By its amended answer, petitioner in effect admitted the truth of the allegations in the Government's complaint, but sought to defend on the ground that the Government's action was one for a "statutory penalty" and not "for the collection of any obligation or indebtedness owing to or the recoupment or recovery of damage suffered by the [United States]" (R. 6). The answer alleged that petitioner had previously been indicted for the "identical offenses charged in the * * * complaint * * *" to which it had pleaded *nolo contendere*, and upon which fines in the aggregate amount of $25,000 had been imposed and paid (R. 6-7, 8-11). The answer further averred that peti-

[10] The "false statements" were statements qualifying the persons named in each of the counts as a veteran for a priority right to make the purchase. See R. 7, 18.

tioner's frauds have not caused the Government any damage or loss since it received the full advertised offering price for the trucks and, had the trucks not all been sold to those having claiming priorities, they would have been sold at the same price to non-priority purchasers such as petitioner (R. 7-8).

Thereafter, both parties moved for summary judgment. The Government's motion was on the ground that there was no genuine issue of fact and further that, since the defenses set out in petitioner's answer were insufficient, the Government was entitled to judgment as a matter of law (R. 3-4). Petitioner's motion was based on the claim that the Government's suit, being for a statutory penalty, was barred by the Fifth Amendment's prohibition against double jeopardy (R. 4-5).

The District Court overruled petitioner's motion for summary judgment and granted the Government's motion, holding in effect that the double jeopardy provision of the Fifth Amendment was not applicable to this civil action for damages (R. 12-13). Accordingly, the District Court entered judgment for the Government for $10,000, $2,000 for each of the five frauds practiced by petitioner, plus costs (R. 13). On appeal, the court below affirmed, holding that Section 26(b)(1) was compensatory and not penal, and therefore that the action was not barred by the Fifth Amendment's prohibition against double jeopardy (R. 17-23).

SUMMARY OF ARGUMENT

A

The holding of the court below that the Government's suit under Section 26(b)(1) of the Surplus Property Act, to recover $2,000 for each of petitioner's five frauds, was not barred by the double jeopardy prohibition—because the civil remedy is compensatory and not punitive—is supported, if not required, by several decisions of this Court, particularly *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537. See also, *United States* v. *Weaver*, 207 F. 2d 796 (C.A. 5) (agreeing with the court below). Applying the comparable provision of the False Claims Act, *Marcus* v. *Hess* held that a prior criminal proceeding was no bar to the Government's recovery of $2,000 for each of the false claims filed in that case. The critical facts are the same here and the statutory provisions and their purposes are practically identical.

In addition, the Surplus Property Act and its legislative history show a definite congressional purpose—the governing criterion, under *Marcus* v. *Hess* and *Helvering* v. *Mitchell*, 303 U. S. 391, in characterizing remedies of this general type—to provide a civil compensatory remedy and not merely a penalty or punitive imposition. *Marcus* v. *Hess* having been decided shortly before the enactment of the Surplus Property Act, "we may assume that the framers of § 26(b) were aware of that decision when they formulated § 26(b)" (R. 19). Moreover, since the other subparagraphs of the Section provide plainly compensatory remedies

for violation of the Act, it is highly unlikely that Congress intended to include a punitive sanction in the same section; indeed, Section 26(d) describes 26(b) as providing "civil remedies" and the Senate Committee's report characterizes Section 26 as giving to the United States "the option of electing among three different measures of damages." S. Rep. No. 1057, 78th Cong., 2d Sess., pp. 13-14. Finally, since the Act itself and its legislative history show that Congress intended that suits under Section 26(b) could and would be brought in addition (and not merely as an alternative) to criminal proceedings, the rule that statutes are to be construed to avoid constitutional issues would seem to require that Section 26(b) be held to provide a compensatory remedy, not a penal sanction.

B.

Petitioner's argument that Section 26(b)(1) is penal in the particular circumstances of this case because the frauds asserfedly caused no damage to the Government is based on a misreading of *Marcus* v. *Hess*. That case, as well as *Helvering* v. *Mitchell*, ruled that the issue is whether Congress, anticipating that frauds under the particular statute would generally cause damage, designed a general statutory formula to provide restitution for damage which might well be hard to prove in any individual case; once it is decided that such was the congressional purpose, the remedy applies to all cases under the statute irrespective of their individual facts or of proof of actual

damage. The comparable remedy in the False Claims Act was actually applied in *Marcus* v. *Hess* without regard to a showing of loss.

Similarly, here it is clear that not only did Congress anticipate damage generally from frauds under the Surplus Property Act but that in fact damage and injury to the Government resulted in several ways. And the difficulty of reducing these damages to a monetary equivalent furnishes full justification for the $2,000 provision of Section 26(b)(1). "The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress." *Marcus* v. *Hess*, 317 U.S. at 552.

ARGUMENT

The Government's Suit to Recover Under Section 26(b)(1) of the Surplus Property Act Is Not Barred by the Prohibition Against Double Jeopardy.

This suit was brought by the United States under Section 26(b)(1) of the Surplus Property Act which provides that "every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act * * *" "shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, * * *."

Petitioner in effect admits that it defrauded the

War Assets Administration in connection with certain sales by that agency of surplus motor vehicles in 1947 (R. 6). It, however, seeks to avoid making the payments prescribed by Section 26(b)(1) on the ground that the $2,000 plus double damage provision constitutes a statutory penalty and consequently that, because of the prior criminal proceedings based on the same frauds, the Government is barred from recovering under Section 26(b)(1) by the double jeopardy provision of the Fifth Amendment.[11] This contention is without merit.

A. *Well-Established Principles Support the Holding Below that Recovery by the Government would not Place Petitioner in Jeopardy for a Second Time.*

The decisions of this Court, particularly that in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, leave no doubt that the instant suit does not operate to place petitioner in jeopardy for a second time contrary to the proscription of the Fifth Amendment. For while it is clear that the double jeopardy provision prohibits the imposition of punishment twice for the same offense (see *e. g., United States* v. *LaFranca*, 282 U. S. 568; *Coffey* v. *United States*, 116 U. S. 436; *United States* v. *Chouteau*, 102 U. S. 603), it is equally well settled that the constitutional prohibition is inapplicable where the second proceeding, although based on the same facts, is not penal in nature. See *e. g., United*

[11] "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *".

States ex rel. Marcus v. *Hess*, 317 U. S. 537; *United States ex rel. Ostrager* v. *Contractors*, 317 U. S. 562; *Helvering* v. *Mitchell*, 303 U. S. 391; *United States* v. *Real Estate Boards*, 339 U. S. 485, 493, fn. 6; *Murphy* v. *United States*, 272 U. S. 630; *Various Items* v. *United States*, 282 U. S. 577; *Boyd* v. *United States*, 116 U. S. 616. Under the latter decisions, particularly *Marcus* v. *Hess*, *supra*, which involved the very same situation and contention by the defrauders as to the comparable provision of the False Claims Act, the right of action vested in the Government by Section 26(b)(1) of the Surplus Property Act constitutes a civil remedy, compensatory in nature. Accordingly, the court below properly held that the instant proceeding does not come under the proscription of the Fifth Amendment.

1. In *Marcus* v. *Hess*, the defendants had pleaded *nolo contendere* to an indictment for conspiracy to defraud the United States and had paid the fines imposed (317 U.S. at 545, 548). After this criminal proceeding, there was instituted against the defendants an action seeking judgment in accordance with the provision of the False Claims Act (Rev. Stat. 5438, 3490, 31 U.S.C. 231), which provides, in language substantially identical to that here involved,[12] that a person who perpetrates certain frauds upon the United States

> * * * shall forfeit and pay to the United States the sum of two thousand dollars, and, in

[12] Rev. Stat. 3490 apparently served as a model for Section 26(b)(1); see *infra*, p. 23.

> addition, double the amount of damages which the United States may have sustained * * * together with the costs of suit.

The defendants argued that the statute under which the action was brought prescribed a penalty and so the prior criminal proceeding, coupled with the prohibition against double jeopardy, precluded assessment of the statutory $2,000 plus double damages for each fraudulent act, as sought in the complaint (317 U.S. at 548).

This Court was unanimous in rejecting these contentions.[13] With the exception of Mr. Justice Frankfurter, who would have based the ruling on this issue on another ground (317 U.S. at 553 ff.),[14] the court was in agreement that the provision of the False Claims Act that the defrauder should "forfeit and pay" $2,000 and double damages for each fraud upon the Government was remedial and

---

[13] Mr. Justice Murphy did not participate in the consideration of the case, 317 U.S. 553. The dissent of Mr. Justice Jackson was directed to an issue other than that of the asserted double jeopardy. 317 U.S. at 556-562.

[14] In the view of Mr. Justice Frankfurter, there was no double jeopardy involved because

> * * * where two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of in a single proceeding. By doing this Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies. [317 U.S. at 555.]

not penal.[15] Pointing out that the double jeopardy provision applies only to "actions intended to authorize criminal punishment to vindicate public justice" and not to "civil, remedial actions brought primarily to protect the government from financial loss" (317 U.S. at 548-549), the Court quoted from its earlier decision in *Helvering* v. *Mitchell*, 303 U.S. 391, 399, to the effect that (317 U.S. at 549):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether * * * [the statute in question] * * * imposes a criminal sanction. That question is one of statutory construction.

And with reference to the False Claims Act before it, the Court held (*ibid*):

> It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. * * * We cannot say that the remedy now before us requiring payment of a lump sum [of $2,000] and double damages will do more than afford the govern-

[15] The holding in *Marcus* v. *Hess* was applied in *United States ex rel. Ostrager* v. *Contractors*, 317 U.S. 562, decided the same day as *Marcus* v. *Hess* and similarly involving the applicability of the double jeopardy provision to an action under the False Claims Act following a criminal proceeding.

ment complete indemnity for the injuries done it.

The Court further elaborated that the $2,000 plus double damage provision of the False Claims Act was enacted by Congress not as a preserver of peace or to vindicate public justice, but in order to protect the property rights of the United States, rights which the Government has just like any other person (at 549-550):

> It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty. Long ago, this Court said, "A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance to be twice punished for the same offense." *Moore* v. *Illinois*, 14 How. 13, 19, 20. Congress has "power to give an action for damages to an individual who suffers by breach of the law." *Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390, 396, 397. And it has this same power when it, rather than some private individual, is injured by a fraud. Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him. "The powers of the

> United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection." *Cotton* v. *United States*, 11 How. 229, 231.

The opinion concluded on this point (at pp. 551-552):

> It is true that "Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned," but this is not enough to label it as a criminal statute. *Brady* v. *Daly*, 175 U.S. 148, 157. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. * * * The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.[16]

---

[16] See also, *United States* v. *Grannis*, 172 F. 2d 507, 511 (C.A. 4), certiorari denied, 337 U.S. 918, where the Court of Appeals for the Fourth Circuit held that "It is clearly established that the defense of double jeopardy is not applicable to civil actions under the federal false claims statute."

As already indicated, *Marcus* v. *Hess* refers to the Court's earlier decision in *Helvering* v. *Mitchell*, 303 U.S. 391. In that case, the defendant, having been acquitted of fraud under the tax laws in earlier criminal proceedings, sought to defeat the Government's subsequent suit for the 50% addendum to the taxes assessed under Section 293 of the Revenue Act of 1928 on the ground that this additional 50% constituted a penalty and hence its recovery by the Government was barred by the double jeopardy prohibition. In rejecting this claim, the Court reaffirmed as long settled "[T]hat acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based" (303 U.S. at 397, see also 303 U.S. at 398-399). The Court then went on to comment (303 U.S. at 401):

> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. In *Stockwell* v. *United States*, 13 Wall. 531, 547, 551, the Court said of a provision which added double the value of the goods:
>
> "It must therefore be considered as remedial, as providing indemnity for loss. And it

> is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed, or purchased, instead of their single value. The act of abstracting goods illegally imported, receiving, concealing or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity * * *.
>
> "The act of 1823 was, as we have seen, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States."

Noting that among the various types of remedial sanction was "the payment of fixed or variable sums of money" (303 U.S. at 400),[17] the Court con-

---

[17] Another remedial sanction, "which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted" such as the deportation of aliens and disbarment. 303 U.S. at 399, fn. 2 and cases there cited. See also, *United States* v. *Real Estate Boards*, 339 U.S. 485, 493, fn. 6 ("The fact that in case of corporations dissolution can result from a civil suit under the anti-trust laws does not make the proceeding any the less remedial. The civil suit aims to put an end to the restraint, not to impose punishment for past acts").

cluded that the basic question is one of statutory construction and that the statute and its history indicated clearly that Congress intended a civil remedial, not a criminal penal, sanction (*id.*, at 401-402).

2. The construction accorded by this Court in *Marcus* v. *Hess* to the $2,000 plus double damage provision of the False Claims Act is fully applicable to the virtually identical provision of Section 26(b)(1) of the Surplus Property Act here involved. As in *Marcus* v. *Hess*, the action was brought by the Government not as preserver of peace or to vindicate public justice, but, as held in *United States* v. *Weaver*, 207 F. 2d 796, 797 (C.A. 5), as "a civil action to recover an award of damages of a compensatory nature, payable to the United States for injuries to its property rights." [18]

---

[18] The *Weaver* case involved the same basic issue as that presented by the instant case, *i. e.*, whether Section 26(b)(1) of the Surplus Property Act is penal or compensatory. Although the context in which that issue was raised in *Weaver* differs from the present one (in *Weaver*, the ultimate question was whether the action was subject to the statute of limitations for suits for penalties contained in 28 U.S.C. 2462), petitioner has recognized that this difference is immaterial and has invoked as support for its position *United States* v. *Witherspoon*, 211 F. 2d 858 (C.A. 6), where in precisely the same context as *Weaver*, Section 26(b)(1) was held penal. (Pet. 5-6, Br. 9). See *infra*, p. 39, fn. 34.

In fact, as the court below held (R. 21), no distinction flows from the difference, for in both the double jeopardy (involved here) and the limitations situations (involved in *Weaver* and *Witherspoon*), "penalty" is used in the sense of an exaction designed to punish an offense against the public justice. Compare *Marcus* v. *Hess*, 317 U.S. at 548-549, *supra*, p. 16, with *Huntington* v. *Attrill*, 146 U.S. 657, 658, 673-74, 683; *Brady* v. *Daly*, 175 U.S. 148, 156; *Chattanooga*

This is evident from the similarity in purpose of the provisions; both relate to frauds upon the Government, the False Claims Act pertaining to frauds in connection with claims submitted to the Government and Section 26(b)(1) dealing with frauds in procuring property from the Government. Indeed, inasmuch as the strong "forfeit and pay" language of False Claims Act was not deemed by this Court to convert the $2,000 plus double damages provision of that Act into a penalty,[19] it would seem, as the court below held (R.

Foundry v. *Atlanta*, 203 U.S. 390, 397; *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 423 (all but one of which cases were referred to in *Marcus* v. *Hess*). This is the sense that "penalty" is given generally under federal law. *Huntington* v. *Attrill*, *supra* (conflicts of laws); *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265 (conflicts of laws); *James-Dickinson Co.* v. *Harry*, 273 U.S. 119, 126 (conflicts of laws); *Sullivan* v. *Associated Billposters and Distributors*, 6 F. 2d 1000, 1009 (C.A. 2) (abatement); *Barnes Coal Corp.* v. *Retail Coal Merchants Ass'n*, 128 F. 2d 645 (C.A. 4) (abatement); *United States* v. *Grannis*, 172 F. 2d 507, 514 (C.A. 4), certiorari denied, 337 U.S. 918 (abatement); *Robertson* v. *Argus Hosiery Mills*, 121 F. 2d 285 (C.A. 6), certiorari denied, 314 U.S. 681 (jurisdiction under 28 U.S.C. 1355); *Fields* v. *Washington*, 173 F. 2d 701 (C.A. 3) (jurisdiction under 28 U.S.C. 1355); *Currie* v. *Flack*, 190 F. 2d 549 (C.A. 1) (jurisdiction under 28 U.S.C. 1355); *Cox* v. *Lykes Brothers*, 237 N.Y. 376, 143 N.E. 226 (jurisdiction under 28 U.S.C. 1355); *Crary* v. *Porter*, 157 F. 2d 410, 413-414 (C.A. 8) (self-incrimination); *Schinkal* v. *United States*, C.A. 9 No. 14313 (decided September 20, 1955), (self-incrimination).

[19] In regard to the "forfeit and pay" language of the False Claims Act the Court commented (317 U.S. at 551):

> It is argued that the $2,000 "forfeit and pay" provision is "criminal" rather than "civil," even if the double damage feature is not. The words "forfeit and pay" relate alike to the $2,000 sum and the double damages.

20), that the milder requirement of "pay" imposed by Section 26(b)(1) would *a fortiori* militate against petitioner's construction.

Moreover, in view of the express ruling in both *Marcus* v. *Hess* and *Helvering* v. *Mitchell* that the problem of the nature of remedy is basically one of statutory construction, and of ascertaining the legislative intent, it is important to note that *Marcus* v. *Hess* was decided in January 1943, shortly before the enactment of the Surplus Property Act of 1944 on October 3, 1944. In these circumstances, "we may assume that the framers of § 26(b) were aware of that decision when they formulated § 26(b)" (R. 19), and, consequently, that by carrying over into Section 26(b)(1) the provisions of the False Claims Act construed as compensatory in *Marcus* v. *Hess*, Congress intended Section 26(b)(1) similarly to provide a civil compensatory remedy.

That Congress intended Section 26(b)(1) to

The use of the word "forfeit" in conjunction with the word "pay" does not force the conclusion that the provision is criminal. No one doubts that Congress could have accomplished the same result by authorizing "double" or "quadruple" or "punitive" damages or a lump sum payment for attorney's fees, or by definition of the elements of "actual damages." Special consequence cannot be drawn from the use of the word "forfeit." While this might under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment. The words "forfeit and pay" are wholly consistent with a civil action for damages. *Atchison, T. & S. F. Ry. Co.* v. *Nichols*, 264 U.S. 348, 350-352; cf. *Hepner* v. *United States*, 213 U.S. 103, 104-111.

be compensatory is also manifest from the face of the Act. Section 26(b), *supra*, p. 3, explicitly describes subsection (b) as providing "civil remedies." In addition, subparagraphs (2) and (3) of that Section, providing only for multiple damages, plainly are compensatory in nature (see, *infra*, p. 38, fn. 32), and it is unlikely that Congress would include a punitive sanction and two compensatory remedies in the same section.

Any doubt as to the congressional intent is dissipated by the legislative history. In its report on S. 2065, 78th Cong., 2d Sess., the bill which, as subsequently amended, became the Surplus Property Act of 1944,[20] the Senate Committe on Military Affairs described the provisions of what was then Section 23(b) as dealing (S. Rep. No. 1057, 78th Cong., 2d Sess., pp. 13-14).

> * * * with the civil liability of persons who engage in false, fraudulent, or fictitious activities, or conceal or misrepresent material facts, or act with intent to defraud the United States, or who enter into an agreement or conspiracy or cause other people to do any of the foregoing. The United States is given the option of electing among three different measures of damages—
>
> (1) Any person engaged in such activities

[20] While the bill enacted was designated H.R. 5125, the Senate, after considering S. 2065, struck everything after the enacting clause of H.R 5125 as it passed the House and substituted therefor the text of the Senate bill, as amended. 90 Cong. Rec. 7330.

can be sued for the sum of $2,000 for each such act, plus twice the amount of any damage sustained by the United States, plus the cost of suit.

(2) The United States may recover from such person twice the consideration which he agreed to give to it.

(3) The United States may keep the property acquired by reason of the above-described fraudulent activities, plus the consideration given to it for that property.

Plainly, Congress viewed all three subparagraphs of Section 26(b) as in *pari materia* and, of particular significance here, viewed subparagraph (1), as well as the other subparagraphs, as compensatory in nature.

Finally, Section 26(d) *supra*, p. 3, expressly provides that the "civil remedies provided in [Section 26] shall be in addition to all other criminal penalties and civil remedies provided by law." In the same vein, the report of the Senate Committee points out (S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14):

> * * * these provisions are exclusive of any other civil remedies which the United States may have and of such provisions of the Criminal Code as relate to fraud (18 U.S.C. sec. 80) and conspiracy (18 U.S.C. sec. 83).

It is apparent that not only did Congress intend actions under Section 26(b) to be in addition,

not an alternative, to criminal proceedings but also that it contemplated the very situation which is here presented—a prior criminal proceeding under 18 U.S.C. 80 (R. 8; Pet. Br. 4, fn. 2)—and which petitioner claims as the basis for the outlawry of the present action by the proscription against double jeopardy. Furthermore, since it would be unconstitutional to apply Section 26 (b)(1) in these circumstances (specifically envisaged by Congress) if it were construed as penal (*Helvering* v. *Mitchell*, *supra*, at 401; *United States* v. *LaFranca*, 282 U.S. 568; *Coffey* v. *United States*, 116 U.S. 436) but there is no such problem if Section 26(b)(1) is held to be compensatory, the rule that statutes are to be construed to avoid constitutional issues (see, *e.g.*, *Murphy* v. *United States*, 272 U.S. 630, 632; *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 120, 121; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319) would seem particularly applicable.

Petitioner's reliance on this Court's earlier opinions in *Coffey* v. *United States*, 116 U.S. 436, and *United States* v. *LaFranca*, 282 U.S. 568, is misplaced (Br. 10). In addition to the doubtful validity of *Coffey* (see, *e.g.*, *Various Items* v. *United States*, 282 U.S. 577; *United States* v. *One Dodge Sedan*, 113 F. 2d 552, 553 (C.A. 3); *United States* v. *Gramer*, 191 F. 2d 741, 743 (C.A. 9)), it should be noted that (1) the defrauders invoked these cases—without success—in *Marcus* v. *Hess* and *Helvering* v. *Mitchell* (Brief for Respondents in No. 173, Oct. Term, 1942, pp. 80 ff.; Brief for Respondent in No. 324, Oct. Term, 1937, pp. 6, 7, 15,

26, 36); (2) that the Second Circuit, in arriving at its holding in *Mitchell* that the double jeopardy provision was applicable, likewise relied upon these cases (89 F. 2d 873, 878; see 303 U.S. at 405-406); and (3) that in *Mitchell* this Court expressely held these cases inapplicable, reasoning that "[s]ince we construe [the statute] as imposing a civil administrative sanction, neither case presents an obstacle to the recovery of * * * the 50 per centum addition here in issue" (303 U.S. at 406); see also *Marcus* v. *Hess, supra,* at p. 554 (concurring opinion of Frankfurter, J.). Similarly, these cases present no obstacle to the Government's recovery in the instant case, since as we have shown above, Section 26(b)(1) is compensatory, not penal.

B. *The Fact that no Damages Were Alleged Does Not Convert the Suit into an Action for a Penalty.*

Asserting that its answer "pleaded facts showing that the Government suffered no damage or loss from the sale of such trucks, having received the full advertised offering price" (Br. 7), petitioner urges that for that reason the instant proceeding must be for a penalty under the principles enunciated in *Marcus* v. *Hess*. This, petitioner reads, as holding that the Goverment's recovery of the statutory sum is compensatory only where "the facts involved in a particular case" show actual damage to the Government (Br. 10). Consequently, petitioner claims, while the Government suffered damages justifying civil recovery in both

Marcus v. *Hess* and *Helvering* v. *Mitchell*; there is no such basis for recovery of compensation here and hence the Government's action under Section 26(b)(1) could only be for a penalty.

1. Petitioner's argument is based on a misreading of *Marcus* v. *Hess*, as well as of *Helvering* v. *Mitchell*. As shown above, the opinion in both cases made it clear that the issue whether the statutory remedy is penal or compensatory is one of general construction and intent, not dependent upon whether actual damages could or would be proved in a particular case. In other words, *Marcus* v. *Hess* held that Congress anticipated that frauds would result in damage to the Government and, since some of these damages might not be reducible to a monetary equivalent, it provided the statutory formula to assure full recovery. "We think," the Court said, "the chief purpose of the statutes here was to provide restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole * * *. The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress," 317 U.S. at 551-552.[21] In these circumstances, the ex-

[21] The Court also said (317 U.S. at 550-1):

> * * * Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages . . . sustained and the cost of suit, including a reasonable attorney's fee." * * * Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men

tent of actual recoverable damages suffered in a particular case is irrelevant, a conclusion fully supported by the statutory language that the Government is to recover "the sum of two thousand dollars, *and, in addition,* double the amount of damages which the United States may have sustained" (emphasis added). See *United States* v. *Rohleder*, 157 F. 2d 126, 129 (C.A. 3).

In this respect, the statutory provision for the Government's recovery is comparable to a contractual provision for liquidated damages, as to which this Court said in *Priebe & Sons* v. *United States*, 332 U.S. 407, 411-412:

> * * * When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. * * * They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. * * * And the fact that the damages suffered are shown to be less than the damages contracted for is

---

are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." * * * This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages. * * * Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. * * * The law can provide the same measure of damage for the government as it can for an individual.

not fatal. These provisions are to be judged as of the time of making the contract.[22]

That the holding in *Marcus* v. *Hess* was not intended to apply only in those cases in which the Government is shown to have suffered specific damage is further evidenced by the fact that, although the District Court's opinion in that case shows that some of the fraudulent acts were detected at the inception and no actual damage was suffered by the Government with respect to several contracts (41 F. Supp. 197, 218 (W.D. Pa.)),[23] this Court did not differentiate these frauds but rejected the defrauders' claim of double jeopardy with respect to *all* the fraudulent acts. See *United States* v. *Rohleder*, 157 F. 2d 126, 129 (C.A. 3). Mr. Justice Frankfurter so understood the Court's opinion.[24]

---

[22] See, also *Sun Printing & Pub. Assn.* v. *Moore*, 183 U.S. 642, 672-674; *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105, 121; *Clydebank Engineering & Shipbuilding Co.* v. *Castaneda* [1905] A.C. 6, 11-13, 20; *United States* v. *Walkof*, 144 F. 2d 75, 77 (C.A. 2).

[23] "The next reason urged by defendants for a new trial is that the court erred in refusal of defendants' 9th point, which reads as follows: '9. There can be no recovery of any penalty or forfeiture on account of any project in which no actual damages have been shown.' Section 3490, R.S., expressly provides for a penalty of $2,000, 'and, in addition, double the amount of damages which the United States may have sustained.' This makes it plain that regardless of damages sustained, the United States would still be entitled to recover the penalty. This point refers to instances where the United States withheld payments on account of the discovery of the fraud, so that no actual damage was shown. However, that would not preclude the United States from recovery of the penalty prescribed by Section 3490, R.S."

[24] In his concurring opinion, Mr. Justice Frankfurter criticized the Court for not allowing "[t]hose who invoke the

The courts of appeals have also read *Marcus* v. *Hess* as giving a general construction of the statute, not limited to particular cases in which damages are proved. *United States* v. *Grannis*, 172 F. 2d 507, 511 (C.A. 4), certiorari denied, 337 U.S. 918; *Murray & Sorenson, Inc.* v. *United States*, 207 F. 2d 119, 123 (C.A. 1).

2. Since the Surplus Property Act of 1944 dealt with the disposal of all kinds and manner of surplus equipment and property, real and personal, ranging up to war plants, ships, strategic minerals, airports, aircraft, harbor and port terminals (see 58 Stat. 765 *ff.*),[25] it would seem clear that the dam-

---

Constitution, as do the respondents here * * * to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss" (317 U.S. at 554).

[25] As noted by the Senate Committee on Military Affairs (S. Rep. No. 1057, 78th Cong., 2d Sess., pp. 2-3):

> * * * Estimates of the value of surplus Government-owned property available for distribution at the end of the war vary from 50 billion dollars to 112 billion. Of course, the bulk of this material will consist of weapons of war unsuitable for any peacetime use. However, it is certain that there will be many billions of dollars of consumers' goods available to supply the accumulated demand of war-imposed civilian shortages; to provide a large part of this Nation's contribution to foreign relief; and to stimulate new demands for new civilian-type products, largely unknown, or at least unavailable to civilians in pre-war times.
>
> At least a third, and probably more, of the Government's $15,000,000,000 investment in plants and equipment will be convertible to peacetime uses. The disposition of the Government-owned plants constructed to supply the expanded need for steel, light metals, chemicals, synthetic rubber, and high-octane gasoline will have

ages likely to result to the Government from frauds committed in connection with the disposal of such property would be at least as extensive and difficult of exact proof as those resulting from the frauds dealt with in the False Claims Act. Thus, the Surplus Property Act's provision for $2,000 plus double damages for each fraudulent act, like the comparable provision of the False Claims Act, constitutes a reasonable measure, in general, of the foreseeable damage to the Government. As was stated in *United States* v. *Weaver* 207 F. 2d 796, 798 (C.A. 5):

> The intent and purpose of the Surplus Property Act of 1944, 58 Stat. 756, were to facilitate and regulate the orderly disposal of surplus property of the United States, including the giving of an opportunity to returning veterans to establish themselves in business, agriculture, or professional life. There can be no doubt that the property rights of the United States were injured as a result of the acts alleged in the complaint. Section 26(b)(1) seeks to indemnify the United States for such injuries. It provides for payment to the United States of an amount not so dispro-

---

a profound effect on the future industrial structure of the Nation. In addition to these integrated facilities, the Government has several billions of dollars invested in such equipment as machine tools, whose wartime production amounts to 20 years' normal supply, and in structures which may, if properly used, house the thousands of new enterprises needed to supply peacetime employment to millions of war workers.

portionate to the actual injury that it cannot be deemed wholly compensatory. * * *

Petitioner's claim that its frauds caused the Government no damage overlooks the fact that the Government intended to sell the surplus motor vehicles in the prescribed order of priority under which dealers such as petitioner were at the bottom of the list; that at the time these sales were made (shortly after the termination of active hostilities in World War II) there was an acute shortage of motor vehicles; that the Government wished to accord a priority to purchase surplus motor vehicles to certified veterans in order to aid them in their reassimilation into civilian life; and consequently that the prices and conditions under which the Government was willing to make these sales to these veterans were far more favorable to them than those generally prevailing in the market place.

In order to help certified veterans in their readjustment to civilian life, the Government was willing to sell these vehicles to them at a price substantially lower than that which the vehicles would bring in the open market. See, *supra*, p. 7, fn. 6. However, the Government was not willing to sell these motor vehicles generally to those not entitled to priority, and even if it were, there is no indication that it would have been willing to sell the vehicles generally at the same price and under the same conditions.[26] In these circum-

[26] Petitioner's allegations that under the advertisement and

stances, petitioner's fraudulent masquerade as various veterans had the effect not only of inducing the Government to sell the vehicles to persons with whom it had no intention of dealing[27] but also of selling the vehicles at lower than market prices to persons not entitled to priority for pur-

---

order of sale, any vehicles left over after all priorities were satisfied would be sold to non-priority purchasers such as petitioner, fail to recognize the realities of the situation then prevailing. The shortage of civilian vehicles was so acute in 1946-1947 that there were not enough surplus vehicles to satisfy the needs of all priority holders. The result was that it was an extremely rare situation that vehicles were sold to non-priority purchasers. In this connection, it is significant that petitioner nowhere claims or even suggests that the price at which the vehicles were sold by the Government was the price then prevailing in the market, whether legitimate, gray or black; in contrast, the fact that petitioner was willing to resort to fraud to obtain these vehicles strongly indicates that the Government's selling price was below market and that petitioner expected to profit, probably substantially, on the resale. At this point, it should also be recalled that among the stated purposes of the Surplus Property Act were the discouragement of disposal of surplus property to speculators and the prevention of the making of unusual and excessive profits. *Supra*, pp. 4-5.

[27] It is well established that a seller has the right to select his purchaser (*Federal Trade Commission* v. *Raymond Co.*, 263 U.S. 565, 573; *Green* v. *Victor Talking Machine Co.*, 24 F. 2d 378, 382 (C.A. 2), certiorari denied, 278 U.S. 602), and the law will protect a seller who has been misled into making a sale by virtue of the purchaser's false representation that he belongs to a class with whom the vendor is willing to deal or that he does not belong to a group with whom the seller is unwilling to have any dealings. *Gordon* v. *Street* [1899] 2 Q.B. 641 (C.A.); cf. *Smith* v. *Wheatcroft*, 9 Ch. Div. 223; *Popham* v. *Eyre*, Lofft 786, 98 Eng. Rep. 919 (Ch., 1774); *Hedden* v. *Griffin*, 136 Mass. 229.

poses not within the stated priorities. Plainly, this caused damage to the Government and its interests.

In addition, by fraudulently procuring the vehicles, petitioner reduced the number of surplus vehicles in the hands of the War Assets Administration. As a result, some government agency which was entitled to priority might very well have been unable to purchase vehicles which it needed from War Assets Administration and so compelled to purchase vehicles at the higher market price. While Congress was agreeable to that result as far as veterans were concerned, it intended that government agencies have top priority—after veterans—to guard against precisely such a result as far as other purchasers were concerned.[28] As stated in S. Rep. No. 1142, 79th Cong., 2d Sess., on the bill according top priority to veterans (at pp. 1-2):

> The committee amendment still continues the general first priority extended to Government agencies. It should be noted that the purpose of this priority is to save the Government money where one Government agency has surplus equipment which another Government agency requires for the discharge of its responsibilities. If the veterans' preference were advanced to outrank the Federal Government priority, the Federal Government might be compelled in many instances to purchase in the open market the same or similar goods as

---

[28] For the order of priority, see the Statement, *supra*, pp. 5-6.

those which were disposed of as surplus by the War Assets Administration.

Thus, petitioner's frauds had the effect of reducing the number of vehicles available to priority holders, including government agencies, and so might very well have caused damage to the Government on this additional score.

Finally, it is settled that the Government is entitled not only to recovery of its actual losses but also to reimbursement of the costs incurred in connection with the ferreting out and investigating the frauds. In *Helvering* v. *Mitchell*, *supra*, at 401, this Court held that the additional tax of 50% imposed in the case of a tax fraud was of a remedial nature "to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."[29] Similarly, *Stockwell* v. *United States*, 13 Wall. 531, had stressed (at 547):

---

[29] While petitioner urges that its answer negates damage to the Government, examination thereof indicates that it does not completely do so. The pertinent allegation of the answer is to the effect (R. 8; see also, *supra*, p. 9):

> That by reason of the facts above set forth, the plaintiff was not damaged and did not suffer any loss because of the sale of said trucks and received the full advertised offering price for the same, and had said trucks not been sold to the persons who purchased them, they would have been sold at the same price to other priority or non-priority purchasers.

This allegation attempts to negate only out-of-pocket damages stemming from the sales themselves and in no way denies that the Government incurred costs in connection with ferreting out the frauds, for which it is entitled to reimbursement as set out in the text.

> * * * It is, then, hardly accurate to say that the only loss the Government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity.

Although the Government was damaged in several ways in the instant case, it is difficult, if not impossible, to reduce the injury to a monetary equivalent.[30] This does not mean, however, that the exaction of the prescribed sum of $2,000 was intrinsically a provision for a penalty. To the contrary, it furnishes the *raison d'etre* for the damage formulae of Section 26(b). In cases involving actionable wrongs the injured party is frequently confronted with serious difficulties in establishing the full extent of the injuries suffered by him and in proving their monetary equivalent.[30] Cf. *Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228, 232.[31] "The most elementary conceptions of jus-

---

[30] This very uncertainty as to the amount which would give full restitution has been the reason why liquidated damage provisions, particularly in government contracts, have been sustained. See, *supra*, pp. 29-30.

[31] In the *Woolworth* case, the Court upheld an award of damages in the amount of $5,000, the maximum allowed by statute for infringement of copyright "in lieu of actual damages and profits", notwithstanding the facts that the infringer showed that its actual profits from the infringement were about $900 and the record failed to show an actually-sustained damage by the copyright owner.

tice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265, and cases there cited. In *Brady* v. *Daly,* 175 U.S. 148, where a statutory minimum damage for copyright infringement was attacked as penal, the Court ruled (at p. 154):

> * * * In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. * * * The person wrongfully performing or representing a dramatic composition is, in the words of the statute, "liable for damages thereof." This means all the damages, that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. * * *

For these reasons, statutes which provide for multiple,[32] lump sum,[33] or minimum damages have

---

[32] *Stockwell* v. *United States,* 13 Wall. 531, 547, 551; *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, 583-4; *Cox* v. *Lykes Bros.,* 237 N.Y. 376, 143 N.E. 226; *Currie* v. *Flack,* 190 F. 2d 549 (C.A. 1); *Helvering* v. *Mitchell,* 303 U.S. 391, 401; *Calvin* v. *Huntley,* 178 Mass. 29.

[33] *Atchison, Topeka & Santa Fé Ry.* v. *Nichols,* 264 U.S. 348, 351; *Douglas* v. *Cunningham,* 294 U.S. 207; *Woolworth Co.* v. *Contemporary Arts,* 344 U.S. 228.

been upheld and applied as properly compensatory.[34]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
Attorney.

OCTOBER, 1955

---

[34] *United States* v. *Witherspoon*, 211 F. 2d 858 (C.A. 6), relied on by petitioner (Br. 9), while opposed to our position, is, we believe, incorrectly decided. In that case, which involved the same situation as the *Weaver* case, the Court of Appeals for the Sixth Circuit ruled that Section 26(b)(1) was penal, subject to the limitation provision of 28 U.S.C. 2462. See *supra*, p. 21, fn. 18. However, the Sixth Circuit went on to rule that the War Time Suspension of Limitations Act was applicable to those frauds which occurred before December 31, 1946. As a result, when *Witherspoon* was decided on March 22, 1954, suits under Section 26(b)(1) for such frauds were still not time barred. Cf. *United States* v. *Smith*, 342 U.S. 225; *United States* v. *Grainger*, 346 U.S. 235, 240-248.

Apart from the fact that the *Witherspoon* opinion merely states its conclusion without supporting reasoning or rationale, it is noteworthy, as the court below commented, that "the opinion made no mention of *Helvering* v. *Mitchell*, *supra*, or *Marcus* v. *Hess*, *supra*, nor why these decisions which we regard as persuasive, were regarded by that court as inapplicable" (R. 21, fn. 2). These cases were urged upon the Sixth Circuit by the Government as was *Weaver*, and as to the latter, the only recognition accorded by the Sixth Circuit was its bare citation preceded by "But see contra" (211 F. 2d at 861).

☆ U. S. GOVERNMENT PRINTING OFFICE : 1955 383303 456